SUPREME COURT, U. S.

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IN F. DAVIS, CLER

Supreme Court of the United States.

OCTOBER TERM, 1969.

No. [redacted]128

ARNOLD TOURS, INC., ET AL.,
Petitioners,
v.
WILLIAM B. CAMP ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

TIMOTHY J. MURPHY,
RICHARD W. MURPHY,
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Table of Contents.

Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement of the case	2
Reasons for granting the writ	4
Conclusion	9
Appendix "A"	10
Appendix "B"	10
Appendix "C"	11
Appendix "D"	12

Table of Authorities Cited.

CASES.

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227	8
American President Lines v. Federal Maritime Board, 112 F. Supp. 346	8
Association of Data Processing Service Organizations, Inc. v. Camp, 279 F. Supp. 675, aff'd, 2/6/69 F. 2d	4n.
Baker, Watts & Co. v. Saxon, 261 F. Supp. 247	4n., 8
Citizens Association of Georgetown v. Simonson, F. 2d	7n.
Flast v. Cohen, 392 U.S. 83	7, 8, 9
Frost v. Corporation Commission of Oklahoma, 278 U.S. 515	7
Frothingham v. Mellon, 262 U.S. 447	8

Investment Company Institute v. Camp, 274 F. Supp. 624 4n.

Rural Electrification Administration v. Northern State Power Co., 373 F. 2d 686 8n.

Saxon v. Georgia Association of Independent Insurance Agents, 399 F. 2d 1010 4n., 5n., 7n.

Texas & Pacific Railway Co. v. Pottorff, 291 U.S. 245 7

Wingate Corporation, The, v. Industrial National Bank, F. Supp. , rev'd, 3/27/69 F. 2d 4n.

STATUTES, ETC.

Administrative Procedure Act, Sec. 10(a), 5 U.S.C. Sec. 702 8, 9

12 U.S.C. Sec. 24(7) 2, 7

28 U.S.C. Sec. 1254(1) 2

Rules of the Comptroller of the Currency, Rule 67 3

MISCELLANEOUS.

Comptroller's Manual for National Banks, Paragraph No. 7475 2

Davis, Administrative Law Treatise, sec. 22.02 8n.

Time Magazine, Business Section, p. 101, Nov. 8, 1968 5n.

Supreme Court of the United States.

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No.

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v.
WILLIAM B. CAMP ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled cause on March 27, 1969.

Opinions Below.

The opinion of the Court of Appeals for the First Circuit is reprinted in Appendix D appended hereto. The opinion of the District Court is reported in 286 F. Supp. 770 (1968) and is reprinted in the Record herein commencing R. 44.*

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*"R" hereinafter refers to the Appendix to Brief for Plaintiffs-Appellants, filed in the First Circuit Court of Appeals.

Jurisdiction.

The opinion of the Court of Appeals was filed on March 27, 1969, and judgment was entered on March 27, 1969 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Question Presented.

Whether the petitioners have legal standing to challenge (a) the decision of the Comptroller of the United States Currency in allowing national banks to enter the travel agency business and (b) the actual entry of the South Shore National Bank into the travel business.

Statute Involved.

The relevant provisions of the National Bank Act, as amended (12 U.S.C. Sec. 24(7)), are printed as Appendix B to this petition.

The Comptroller's ruling contained in Comptroller's Manual for National Banks, Paragraph No. 7475, is printed as Appendix C to this petition.

Statement of the Case.

The petitioners are forty-two independent travel agents of Massachusetts engaged in the travel agency business. Many of the activities and obligations of the travel agents are controlled by conferences of air and steamship carriers which are in certain instances supervised by the Civil Aeronautics Board and the Federal Maritime Commission (R. 2 and Exhibit A).

The petitioners brought this suit individually and also as a class on behalf of all other Massachusetts firms in the travel business (R. 2-3).

The respondent William B. Camp is the Comptroller of the Currency, who is charged by law with administrative and regulatory authority with respect to national banks. Mr. Camp's predecessor, Comptroller James J. Saxon, a former lobbyist and attorney for the national banks, in 1963 arbitrarily ruled, without notice and without a hearing, that national banks may enter into the travel business on a full-scale basis for profit (R. 14). This decision represented a change in policy on the part of the Comptroller (R. 4).

Rule 67, issued by the Comptroller in 1949, stated: "It is the position of this office that a national bank does not have the legal right to act as agent . . . of transportation companies in the operation of a regular travel agency . . ."

In November, 1966, respondent South Shore National Bank availed itself of the Comptroller's ruling and entered into the travel agency business. Said Bank, with approximately twenty-seven branches, is the first and only bank in Massachusetts to engage in the travel agency business (R. 5). It has entered into the travel business on a large-scale basis and has launched a massive advertising program, complete with seven roadway billboards, full-page newspaper ads and a radio saturation program (R. 5 and Exhibit B).

There are approximately ninety other national banks in Massachusetts with approximately three hundred forty-five branches (R. 6).

The petitioners contend that the Comptroller exceeded his authority in allowing the national banks to enter into the travel business and that the South Shore National Bank is illegally competing with them for travel customers. The

petitioners have lost substantial business and profits and stand to lose even greater business and profits in the future as a result of the South Shore National Bank's illegal entry into the travel business (R. 3, 5, 6, 7, 24, 27).

As a result thereof, on May 8, 1967, the petitioners brought suit for a declaratory judgment and mandatory injunction (R. 2-8).

On July 11, 1968, motions for summary judgment brought by the respondents were allowed by the District Court and a similar motion brought by the petitioners was denied (R. 44, 48-49). The court held that the petitioners had no standing to sue.

From such order of the District Court, the petitioners appealed to the United States Court of Appeals for the First Circuit (R. 49). That court affirmed the judgment of the District Court in a written opinion (Appendix D herein).

Reasons for Granting the Writ.

The issue as to whether small independent businesses have standing to challenge competition presented by the national banks pursuant to authority given by the Comptroller has sprung up all over the country. Inconsistent opinions have been rendered by the various courts based upon varied and diverse reasoning.[1]

The Court of Appeals in the instant case, by its own admission, has rendered a decision in conflict with the de-

[1] Compare *Saxon* v. *Georgia Association of Independent Insurance Agents*, 399 F. 2d 1010 (5th Cir. 1968), *Baker, Watts & Co.* v. *Saxon*, 261 F. Supp. 247 (D. D.C. 1966), and *Investment Company Institute* v. *Camp*, 274 F. Supp. 624 (D. D.C. 1967), with *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 279 F. Supp. 675, aff'd, 8th Cir. 2/6/69, F. 2d and *The Wingate Corporation* v. *Industrial National Bank*, F. Supp. (R.I. D.C. 1968), rev'd, 1st Cir. 3/27/69 F. 2d

cision of at least one other Court of Appeals on the same matter.[2] In fact, this Court of Appeals has rendered conflicting decisions within a singular opinion inasmuch as it held that data processing service corporations do have standing to challenge competition by national banks but that travel agents do not have standing to challenge such competition. The obvious anomaly is that the business of data processing is more closely related to the business of banking than is the business of travel service.

With the recent phenomenon of one-bank holding companies and with the growing invasion of conglomerate industries, it is apparent that illegal competition by national banks should be stopped. The Chairman of the Federal Reserve Board, William McChesney Martin, said in opposition to the Comptroller that the entry by the banks into unrelated business ". . . can affect the whole capitalistic system in the United States. The line between banking and commerce should not be erased."[3] The travel agents attempted to prevent the line from being erased but have been denied even the opportunity to raise the issue. This recent trend by national banks to invade business areas totally unrelated to the business of banking poses an important question of federal law, namely, what are the limits of power that Congress has given national banks.

The Court of Appeals said in effect that the national banks have the right to choose what they want to do, both literally and figuratively, and such conduct is "none of plaintiffs' business" (App. D, p. 14). Further the First Circuit implied that the South Shore National Bank is involved in illegal "ultra vires" activity but "even assuming that [they] . . . are prohibited by section 24(7) from en-

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[2] *Saxon* v. *Georgia Association of Independent Insurance Agents*, 399 F. 2d 1010 (5th Cir. 1968).

[3] Time Magazine, Business Section, p. 101, Nov. 8, 1968.

tering into the [travel] business . . . this is not sufficient to provide a statutory aid to standing" (App. D, p. 17). Such a decision seems to elevate form over substance and constitutes a convenient avoidance by the Federal Court to stop conduct which is obviously illegal and prohibited by Congress. The fine technical distinctions enunciated by the Court of Appeals in explaining why data processing companies do have standing and why travel agents do not have standing provide scholarly fodder for legal research analysts but they provide double-talk and side-stepping to the petitioners and other small businessmen. In getting bogged down in the refinements of the standing issue, the Court has allowed itself to get further and further away from the realities of this age and opens itself to persuasive attack by those who say that the law has no relevance and that the little man is prevented by the government from getting his day in court. One excellent example of overlegalism and confusion in this case is where the First Circuit said that the petitioners have standing to be told they have no standing, but they do not have standing to challenge illegal competition.[4]

The mere fact that there is no explicit law allowing a Comptroller's decision to be judicially reviewed or protecting the travel agents from competition should not prevent this Court from granting standing to the petitioners. In finding standing, this Honorable Court would not be usurping the powers of the Congress because it is clear that the banks' participation in the travel business is illegal. Congress has made it clear that national banks are only to exercise that power specifically given to them by Congress.

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[4] The Court said as follows: "The Comptroller argues at length that this [operating full travel service] is traditional and legitimate bank activity. We do not, however, consider this matter except to say that . . . the question of standing is properly before us." (Appendix D, p. 14.)

As Brandeis, J., said: "The measure of their [national banks] powers is the statutory grant; and powers not conferred by Congress are denied." *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U.S. 245, 253 (1934). Section 24(7) of the National Bank Act (12 U.S.C. Sec. 24) lists numerous powers explicitly granted to banks and as the First Circuit held: "It has long been settled . . . that the enumeration of such powers is an effective and strong prohibition of all activities not enumerated and not incidental to banking" (App. D, p. 16). Thus, it is clear that national banks are prohibited by Section 24(7) from entering into the travel business. The petitioners are recipients by implication of Congressional protection and accordingly have the requisite statutory aid to standing. *Frost* v. *Corporation Commission of Oklahoma*, 278 U.S. 515 (1929).

To affirm the First Circuit's decision would be to permit the national banks to compete illegally in any businesses they wanted to where there were no express laws protecting the damaged businesses. For example, national banks could go into the night club, laundry, liquor or construction business, etc., without fear of reprisal.

The doctrine of standing has been eroded almost completely by its exceptions. Because it is a doctrine of judicial invention and convenience, it has been interpreted and applied in many different ways. This Honorable Court recently attempted to reshape the doctrine in the case of *Flast* v. *Cohen*, 392 U.S. 83 (1968). However, even *Flast* has been interpreted and applied differently.[5]

It is the petitioners' contention that this Honorable Court's new philosophy on the doctrine of "standing" should be applied to the case at bar. Accordingly, since

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[5] Compare Judge Thornberry's concurring opinion in *Saxon* v. *Georgia Association of Independent Insurance Agents*, 399 F. 2d 1010 (5th Cir. 1968), and *Citizens Association of Georgetown* v. *Simonson*, F. 2d (D.C. Cir. 1968).

this case poses sufficient adversity and clarity, the Court of Appeals should have found "standing."

Moreover, petitioners contend that Section 10(a) of the Administrative Procedure Act, 5 U.S.C. Sec. 702, provides standing for any persons claiming to be "adversely affected in fact." This contention has been supported by some federal courts[6] and by Professor Davis in his Administrative Law Treatise.[7] The interpretation and application of Section 10(a) of the Administrative Procedure Act is also in a state of confusion among federal courts and should be resolved by the Supreme Court.[8]

In the case at bar the Court is not burdened with deciding a frivolous issue, a political issue, an abstract issue or an issue where the plaintiffs' interest is "comparatively minute and indeterminable," which are the typical cases wherein the legal roadblock of "standing" is invoked. *Frothingham* v. *Mellon*, 262 U.S. 447 (1923); *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227 (1937). Moreover, "the fear expressed in *Frothingham* that allowing one taxpayer to sue would inundate the federal courts with countless similar suits has been mitigated by the ready availability of the devices of class actions and joinder under the Federal Rules of Civil Procedure . . ." *Flast* v. *Cohen*, 392 U.S. 83, 94 (1968). The instant case involves a real, serious and adverse case and controversy which should not be sidetracked from the judicial artifice of "standing."

In summary, it is submitted that there are many reasons why this case should be reviewed. First, there are con-

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[6] *American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346 (D. D.C. 1953); *Baker, Watts & Co.* v. *Saxon*, 261 F. Supp. 247 (D. D.C. 1966).

[7] Davis, Administrative Law Treatise, sec. 22.02.

[8] Compare *Baker, Watts & Co.* v. *Saxon*, 261 F. Supp. 247 (D. D.C. 1966), with *Rural Electrification Administration* v. *Northern States Power Co.*, 373 F. 2d 686, 692-693 (8th Cir. 1967).

flicting federal decisions on the main issue of standing as it relates to national banks and there are conflicting federal decisions on the subsidiary issue of standing relating to the interpretation and application of the *Flast* case and the Administrative Procedure Act, Sec. 10(a). Second, this case involves an important federal question of national magnitude and of grave concern to our economic leaders. The time is ripe for a national decision involving the national banks.

Conclusion.

It is respectfully submitted that, for the reasons above stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY J. MURPHY,

RICHARD W. MURPHY.

Appendix "A."

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7192.

ARNOLD TOURS, INC., ET AL.,
PLAINTIFFS, APPELLANTS,
v.
WILLIAM B. CAMP ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT.

Entered March 27, 1969.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
/s/ ROGER A. STINCHFIELD
Clerk

Appendix "B."

STATUTE INVOLVED.

Title 12, United States Code, § 24, paragraph Seventh, in pertinent part, states:

> "Upon duly making and filing articles of association and an organization certificate a national banking asso-

ciation shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

. . . . . .

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter."

Appendix "C."

COMPTROLLER'S MANUAL FOR NATIONAL BANKS

No. 7475. National banks acting as travel agents.

Incident to those powers vested in them under 12 U.S.C. 24, national banks may provide travel services for their customers and receive compensation therefor. Such services may include the sale of trip insurance and the rental of automobiles as agent for a local rental service. In connection therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank.

Appendix D.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7192.

ARNOLD TOURS, INC., ET AL.,
PLAINTIFFS, APPELLANTS,
v.
WILLIAM B. CAMP ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

and

No. 7186.

THE WINGATE CORPORATION,
PLAINTIFF, APPELLANT,
v.
INDUSTRIAL NATIONAL BANK ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before ALDRICH, *Chief Judge*,
WOODBURY,* *Senior Circuit Judge*, and
COFFIN, *Circuit Judge*.

No. 7192.

Richard J. Murphy, with whom *Timothy J. Murphy* was on brief, for appellants.

Alan S. Rosenthal, Attorney, Department of Justice, with whom

*Sitting by designation.

Edwin L. Weisl, Jr., Assistant Attorney General, *Paul F. Markham*, United State Attorney, and *Leonard Schaitman*, Attorney, Department of Justice, were on brief, for William B. Camp, Comptroller of the Currency, appellee.

Elliott V. Grabill, with whom *Arthur H. Bloomberg* and *Grabill, Ley & Butterworth* were on brief, for South Shore National Bank, appellee.

No. 7186.

Edward J. Regan, with whom *Eustace T. Plaikos* and *Graham, Reid, Ewing & Stapleton* were on brief, for appellant.

Matthew W. Goring, with whom *Edward M. Watson, Robert W. Meserve, John B. Newhall, Gordon L. Doerfer, Hinckley, Allen, Salisbury & Parsons* and *Nutter, McClennen & Fish* were on brief, for Industrial National Bank of Rhode Island, appellee.

Alan S. Rosenthal, Attorney, Department of Justice, with whom *Edwin L. Weisl, Jr.*, Assistant Attorney General, *Edward P. Gallogly*, United States Attorney, and *Stephen R. Felsons*, Attorney, Department of Justice, were on brief, for William B. Camp, Comptroller of the Currency, appellee.

Robert J. McOsker, City Solicitor, and *Vincent J. Piccirilli*, Assistant City Solicitor, on brief for City of Providence, appellee.

Matthew Hale on brief for The American Bankers Association, amicus curiae.

March 27, 1969.

ALDRICH, *Chief Judge*. These are two actions by parties engaged in certain business pursuits to restrain competition from national banks which, supported by rulings of the Comptroller of the Currency, have entered their fields. Plaintiffs seek, basically, to attack these rulings. In both cases the district courts held that they were without standing to do so, and dismissed the complaints on motions of the defendants. Plaintiffs appeal.

THE TRAVEL AGENCY BUSINESS

We consider first the action brought by Arnold Tours, Inc. and some forty other independent travel agencies in Massachusetts, allegedly on behalf of others similarly sit-

uated as well as themselves, against the Comptroller and the South Shore National Bank. The bank, in reliance upon a ruling by defendant Comptroller's predecessor,[1] is engaging not merely in the financial aspects of travel, but "full" travel service, or a complete travel agency business. To quote from what is said to be the bank's own announcement, its employees are prepared to arrange for bicycles in Bermuda, villas on the Riviera, and houseboats in Kashmir. The Comptroller argues at length that this is traditional and legitimate bank activity. We do not, however, consider this matter except to say that plaintiffs present enough of an issue so that the question of standing is properly before us. We also note that no question of reviewability of the Comptroller's rulings has been raised. *See generally*, Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367, 383 & n. 60 (1968). Our sole question is the correctness of defendants' contention, which we will paraphrase as saying that what the bank chooses to do is, both literally and figuratively, none of plaintiffs' business.

It has long been settled that an ordinary competitor has no standing to complain of a party's lack of legal authority to engage in his business, in a suit against the competitor, the government, or both. *Railroad Co.* v. *Ellerman*, 1881, 105 U.S. 166; *Alabama Power Co.* v. *Ickes*, 1938, 302 U.S. 464; *Tennessee Power Co.* v. *TVA*, 1939, 306 U.S. 118. Despite numerous exceptions, this principle has withstood

[1] "¶7475. National banks acting as travel agents.

Incident to those powers vested in them under 12 U.S.C. 24, national banks may provide travel services for their customers and receive compensation therefor. Such services may include the sale of trip insurance and the rental of automobiles as agent for a local rental service. In connection, therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank. See ¶7376."

erosion not only because of the traditional rationale behind standing doctrines generally, *see Flast* v. *Cohen*, 1968, 392 U.S. 83, 91-101, but because of the policy encouraging free and open competition—a policy that favors competition in the market place, not in the courts. The exceptions, where standing is recognized, are as well established as the principle itself. The first is for complaints of "illegal" competition, by which is usually meant competition that is unlawful as to plaintiff apart from considerations of corporate power or authority. *See Alabama Power Co.* v. *Ickes, supra* at 479; *Central Louisiana Elec. Co.* v. *REA*, W.D.La., 1964, 236 F.Supp. 271, 277, *rev'd*, 5 Cir., 354 F.2d 859, *cert. denied* 385 U.S. 815; *but cf. Kansas City Power & Light Co.* v. *McKay*, D.C.Cir., 1955, 225 F.2d 924, *cert. denied* 350 U.S. 884. Plaintiffs do not suggest that the Comptroller has sanctioned, or that the bank has undertaken, any unfair, conspiratorial, or criminal methods of competition, or that there has been any violation of the antitrust laws. The second exception is where it is claimed that some "legal right" has been injured, by which is meant, in its nonconclusory sense, that plaintiff has an independent property right, or a right to be free from the particular kind of competition he is challenging. Such a right is attached to or arises out of an exclusive franchise, on the one hand, or a restricted license or the like, on the other. *Frost* v. *Corporation Commission*, 1929, 278 U.S. 515; *cf. Whitney National Bank* v. *Bank of New Orleans*, D.C.Cir., 1963, 323 F.2d 290, 299-300, *rev'd on other grounds*, 379 U.S. 411. Plaintiffs fit in no such category.

The final general exception is where the plaintiff can show the existence of a "statutory aid to standing" for a class of persons which includes himself. This statutory aid may take the form of a "judicial review" provision of the particular administrator in question for "parties ag-

grieved," "adversely affected," or the like. In such a case, *FCC* v. *Sanders Bros. Radio Station*, 1940, 309 U.S. 470, would presumably provide standing for legitimate competitors. *See generally, Jaffe, Judicial Control of Administrative Actions*, 513-31. There is, however, no such provision as to the Comptroller of the Currency. An alternative statutory aid may be found if there is an indication of Congressional intent, explicit or implicit, in the relevant substantive acts to grant protection to the competitive interests of a class of businesses which includes the plaintiff. Thus in *Hardin* v. *Kentucky Utilities Co.*, 1968, 390 U.S. 1, the Supreme Court found that a competing private utility company had standing to challenge the expansion of TVA into new areas in alleged violation of the area limitations of section 15d(a) of the Tennessee Valley Authority Act, 16 U.S.C. § 831n-4 (a). The Court said, "[O]ne of the primary purposes of the area limitations in § 15d of the Act was to protect private utilities from TVA competition. . . . Since respondent is thus in the class which § 15d is designed to protect, it has standing . . . ." 390 U.S. at 6-7.

The only possible statutory aid to the standing of travel agents in national banking legislation exists in 12 U.S.C. §24(7). This section states that national banks may "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking," and then lists numerous powers explicitly granted. It has long been settled in suits over private contracts that the enumeration of such powers is an effective and strong prohibition of all activities not enumerated and not incidental to banking. *See First National Bank* v. *National Exchange Bank;* 1875, 92 U.S. 122, 128; *National Bank* v. *Matthews*, 1878, 98 U.S. 621, 625; *Logan County National Bank* v. *Townsend*, 1891,

139 U.S. 67, 73. But even assuming that national banks are prohibited by section 24(7) from entering into the business of procuring travel arrangements, this is not sufficient to provide a statutory aid to standing. The prohibition must be demonstrably intended to protect the competitive interests of other members of the prohibited business. *See* the concurring opinion of Judge Thornberry in *Saxon* v. *Georgia Ass'n. of Independent Ins. Agents*, 1968, 5 Cir., 399 F.2d 1010, 1019; *Association of Data Processing Serv. Organizations* v. *Camp*, D.Minn., 1968, 279 F.Supp. 675, *aff'd*, 8 Cir. 2/6/69, F.2d .. We, too, (see 8th Cir. opinion in *Camp*, n.10), cannot accept the simplistic suggestion by the majority in *Georgia Ass'n*, 399 F.2d at 1016, that as soon as it appears that the competitive activities were unlawfully carried out the plaintiffs have standing.

The plaintiffs have not pointed to, nor have we in our research discovered, any evidence that Congress in delimiting the scope of banking activity in the ultra vires section, quoted *supra*, was concerned, in 1863 and 1864 when the national banks were formed,[2] with competitors in the businesses impliedly prohibited, much less in any particularity with travel agents (if they then existed). Rather, the limitations were for the purpose of insuring the stability, liquidity, and safety of the banks. *See National Bank* v. *Matthews*, *supra* at 626; Davis, Banking Regulation Today: A Banker's View, 31 Law & Contemp. Problems 639 (1966). *See also* Million, The Debate of the National Bank Act of 1863, 2 J. of Pol. Econ. 251 (1894). No doubt Congress has continuously, from 1864 to the present, been "very careful" (see *infra*) in restricting the activities of

[2] National Bank Act of 1863, ch. 58, 12 Stat. 665; National Bank Act of 1864, ch. 106, 13 Stat. 99.

banks; and no doubt Congress has been, as we shall see in the second portion of this opinion, specifically concerned with certain potential competitors of the banks. But as Senator Proxmire pointed out while offering an amendment to banking legislation [3] specifically designed to protect particular competitors, the thrust of the close regulation of banks is for purposes of stability: "We are very careful in the regulations of banks. This has principally been done to assure the solvency of the banks by limiting the activities of banks to safe and relatively liquid investments." 108 Cong. Rec. 22031 (1962). (*See also* S.Rep. No. 2105, 87th Cong., 2d Sess. (1962) (Supplemental views of Senators Proxmire, Douglas, and Neuberger) in 2 U.S. Code Cong. & Admin. News, 1962, at 3887. While at some point Congressional concern with a sufficient quantity of specific competitors of banks might indicate a Congressional intent that section 24(7) should now be read as a measure not only to protect investors but also to protect all potential members of prohibited activities, such a point has not been reached. More proof of Congressional solicitude is required before this court or any court should convert an economic struggle into a legal one.

The plaintiffs have suggested, however, that the general rule denying competitors standing is no longer valid, or has undergone substantial change. First, they argue that section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 provides standing for any persons claiming to be "adversely affected in fact." This contention seems derived from the interpretation of section 10(a) urged by Professor Davis in his Administrative Law Treatise, § 22.02, and presumably adopted in *American Presi-*

[3] This legislation will form the basis of our holding in the second half of this opinion.

dent Lines v. *FMB*, D.D.C., 1953, 112 F.Supp. 346.[4] We, however, choose to side with Professor Jaffe[5] and the majority of the courts[6] in holding that the passage of the APA was not intended to alter to such a drastic extent previous law on the question of standing. Moreover, we should add that we have serious reservations whether a test of "adversely affected in fact" would provide a simpler means of deciding the issue of standing. We do not pause for such analysis in the present case, but if, as has been suggested, simplicity and ease of determination is a reason for preferring the new interpretation, we do not find it.[7]

The plaintiffs alternatively urge that *Flast* v. *Cohen*, *supra*, indicates a major shift in the judicial attitude toward the general doctrine of standing; and that while it is not directly in point, this decision indicates that the relevant test for determining standing in this situation is whether the parties are sufficiently adverse to bring into focus the issues raised. *See also* the concurrence of Judge Thornberry in *Saxon* v. *Georgia Ass'n of Independent Ins. Agents*, *supra*. Our first response to plaintiffs' contention is that *Flast* v. *Cohen* was not intended to have any major

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[4] *See also Baker, Watts & Co.* v. *Saxon*, D.D.C., 1966, 261 F.Supp. 247.

[5] Jaffe, Judicial Control of Administrative Action 528-30. *See also* Note, Competitors' Standing To Challenge Administrative Action Under the APA, 104 U.Pa.L.Rev. 843 (1956).

[6] *See Saxon* v. *Georgia Ass'n of Independent Ins. Agents*, *supra*, at 1019 n.1; *REA* v. *Northern States Power Co.*, 8 Cir., 1967, 373 F.2d 686, 692-93 & nn. 9-10, cert. denied 387 U.S. 945; *Kansas City Power & Light Co.* v. *McKay*, *supra*.

[7] Indeed, one of the bases for the rule against competitors' suits might well be the difficulty of determining whether mere increased competition is an injury in fact, particularly where a new and largely undeveloped market is involved. Cf. *World Airways, Inc.* v. *Northeast Airlines, Inc.*, 1 Cir., 1966, 358 F.2d 691.

reshaping effect outside the area of standing determinations under Article III for taxpayer suits challenging the constitutionality of a federal taxing and spending statute. Such an approach to standing as used in *Flast*—one focusing solely upon an assessment of the degree of adversity and clarity of the particular case—if applied to questions of administrative law standing would disturb the entire judicial relationship to the administrative as presently understood by Congress. Congress now knows that if it wishes a particular class of plaintiffs to have, or not to have, standing to seek review of agency rulings, it may make, or not make, the types of legislative provisions discussed earlier in this opinion, and that is an end to the matter. Under plaintiffs' proffered approach, the courts would have the last word on standing, based upon their view of the justiciability of the particular circumstances pleaded. When the conflict is one of constitutional dimensions, such an approach may be necessary. In purely administrative matters we think otherwise.

Our second answer is that even if we were to assume that *Flast* v. *Cohen* was intended to affect other areas, we do not read that case to require all administrative standing determinations to be made solely upon an assessment of the degree of adversity and clarity. Rather, *Flast* was concerned with reevaluating the standards for determining adversity and clarity in a situation where the relevant standing doctrine was adjudged to rest entirely upon such considerations. *Flast* is inapplicable when the standing doctrine in question rests upon a basis largely independent of the concerns for adversity and clarity—namely, the limited role of the judiciary in regulating legitimate competition.

In sum, we find no acceptable basis for standing for the travel agents.

DATA PROCESSING

Turning to the second action involving the Comptroller, here plaintiff, Wingate Corporation, which performs certain data processing services for hire, brings suit to enjoin the defendant, Industrial National Bank of Rhode Island, from performing data processing services for the City of Providence, as sanctioned by a general ruling of the Comptroller. While Wingate, like Arnold, complains that the bank is violating section 24(7) of 12 U.S.C. by providing such services to bank customers, its claim to standing is aided by the presence of specific Congressional legislation dealing with banks and computer servicing. In 1962 Congress, after some debate, enacted the Bank Service Corporation Act, 76 Stat. 1132, which allowed small banks to combine to form a separate corporation which could own data processing equipment. The primary purpose of this legislation was to allow small banks to compete more effectively with the larger banks, which had sufficient capital and business to buy their own electric data processing equipment. However, in order to prevent such corporations being used as a subterfuge for entering into the nonbanking business of data processing, and to protect the interests of certified public accounting firms, Congress provided in section 4 of that Act, 12 U.S.C. § 1864, "No bank service corporation may engage in any activity other than the performance of bank services for banks." The legislative history is clear. The prohibition originated in an amendment proposed by the National Society of Public Accountants, which objected to the original version of the bill that would have allowed bank service corporations to solicit outside business to some extent. The

Accountants feared injury to their growing business of bookkeeping with the aid of computers. The final provision was an obvious response. *See* 108 Cong. Rec. 16499, 22031 (1962); Hearings on Misc. Bank Bills Before the Comm. on Banking & Currency of the United States Senate, 87th Cong., 2d Sess., at 79-80 (1962).

We conclude that the present plaintiff is within the class of persons intended to be protected by section 4 of the 1962 legislation, and the only question is whether standing exists to complain not of competition from bank service corporations, but from national banks directly. We conclude in the affirmative. When Congress so explicitly provides protection for a particular business against competition from a regulated national entity—even though indirectly by regulating a subsidiary—standing exists at least to entertain complaints by that business concerning its competitive relationship to the national entity. Section 4 had a broader purpose than regulating only the service corporations. It was also a response to the fears, expressed by a few senators, that without such a prohibition, the bill would have enabled "banks to engage in a nonbanking activity," S.Rep. No. 2105, *supra* (Supplemental views of Senators Proxmire, Douglas, and Neuberger), and thus constitute "a serious exception to the accepted public policy which strictly limits banks to banking." (Supplemental views of Senators Muskie and Clark). We think Congress has provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against.[8]

[8] *But cf. Association of Data Processing Serv. Organizations* v. *Camp*, 8 Cir., 1969, F.2d , n.12, which stated that the reliance of similar plaintiffs upon the Act for standing was "misplaced."

Indeed, there is a plausible argument that the Bank Service Corporation Act, read in conjunction with 12 U.S.C. § 24(7), does in fact impliedly prohibit national banks from directly entering into the data processing service business. If the section four prohibition could be avoided by a small national bank, member of a group owning a service corporation, soliciting its own data processing customers to be serviced by the subsidiary via the bank, the prohibition would be largely illusory. And if a small bank could not directly solicit such customers, it would follow that the large banks, owning their own equipment, could not, or the equalizing effect of the Bank Service Corporation Act would be lost. To be considered in opposition to such an argument is the Comptroller's ruling interpreting the section,[9] and the phenomenon of the one-bank holding company, that is not covered by the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-49, which requires only multi-bank holding companies to divest themselves of all nonbanking interests. We leave the resolution of this conflict to future determination. For the purposes of the issue of standing, we need decide only that the passage of the Bank Service Corporation Act arguably prohibits direct entry by national banks into the data processing service business.

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[9] Comptroller's Ruling ¶7399 provides in part that:

"... such corporations may only perform bank services for banks. Bank services, however, as defined in the Act, would include any service which a bank would ordinarily perform for a customer. Accordingly, if a bank undertakes to handle the payroll accounts or the accounts receivable of a customer, a bank service corporation may perform for the bank the service necessary to enable the bank to fulfill its undertaking."

In case No. 7192 the judgment of the District Court is affirmed.

In case No. 7186 the judgment of the District Court is vacated and the case remanded for further proceedings not inconsistent herewith.